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JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF  
11 SPOKANE a/k/a THE CATHOLIC  
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11  
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF  
17 SPOKANE, et al.,

Defendants.

ST. THOMAS MORE PARISH'S  
OPPOSITION TO  
SUMMARY JUDGMENT

19 St. Thomas More and its Parishioners ("St. Thomas More"), in opposition to the Tort  
20 Litigant Committee's (the "Committee") Motion for Summary Judgment (Docket Nos. 63-67,  
21 72), submits the following memorandum of law. This memorandum incorporates and is  
22 supported by the Affidavit of the Reverend Abbot Adrian Parcher, the Affidavit of Martin  
23 Weber, Parishioner, and Defendants' Omnibus Statement of Facts (LR 7056). St. Thomas  
24 More also adopts and incorporates those Affidavits filed by other Defendants opposing  
25 Plaintiff's Motion.  
26

ST. THOMAS MORE PARISH'S OPPOSITION  
TO SUMMARY JUDGMENT - 1

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I.

**RELIEF REQUESTED**

The Committee's attempt to deny St. Thomas More its ownership interest in real property that St. Thomas More paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to St. Thomas More;

2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from St. Thomas More, a non-debtor, and

3. St. Thomas More's equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive St. Thomas More of fundamental property rights and religious freedoms must be denied.

II.

**PROCEDURAL HISTORY**

**A. The Bankruptcy**

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including St. Thomas More. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor St. Thomas More disputes this particular trust relationship.

1 **B. Appointment of Creditors Committee**

2 On February 2, 2005, the Court entered an Order duly approving the appointment of  
3 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who  
4 filed complaints against the Diocese in the Superior Court of the County of Spokane, State  
5 of Washington. Neither the Committee nor its members have asserted a claim in State  
6 Court against St. Thomas More or identified any legal relationship with St. Thomas More.

7 The legal standing of the Committee to seek declaratory relief against non-debtors in  
8 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

9 **C. The Adversary**

10 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in  
11 this adversary proceeding ("Adversary Proceeding"), specifically:

- 12 • FIRST CAUSE OF ACTION  
(Declaratory Relief: The Disputed Real Property)
- 13 • SECOND CAUSE OF ACTION  
(Declaratory Relief: the Disputed Personal Property)
- 14 • THIRD CAUSE OF ACTION  
(Declaratory relief: Substantive Consolidation)  
15 (Docket No. 1, Complaint)  
16  
17

18 Although property is allegedly "disputed," the Committee does not have or assert a  
19 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

20 The relief sought by the Committee is drafted as equitable, although it is clearly of  
21 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 22 1. Declaring that the Disputed Real Property is property of the estate under 11  
23 U.S.C. § 541(a)(1) as of December 6, 2004;
- 24 2. Declaring that the Disputed Personal Property is property of the estate under  
25 11 U.S.C. § 541(a)(1) as of December 6, 2004;
- 26

1           3.       Ordering the Debtor to amend its Amended Statement of Financial Affairs and  
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property  
3 and the Disputed Personal Property are all property of the estate;

4           4.       Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy  
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6           (Adv Complaint, p. 15)

7           By way of the Complaint, the Committee seeks to determine the property rights and  
8 interests of not only St. Thomas More, but of 82 non-debtors. The Complaint seeks to  
9 deprive those non-debtors of their instrumentalities used in religious worship, faithful  
10 exercise of its mission, activities, and ministries.

#### 11       **D.       Motion for Avoidance Powers**

12           On February 7, 2004, the Committee filed a motion in the main case seeking  
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,  
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5  
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.

16           (Main Case Docket No. 393)

#### 17       **E.       Motion for Summary Judgment**

18           The Committee filed the present motion for summary judgment ("Motion") on April  
19 17, 2005. (Adv. Docket No. 63)

20           The Motion seeks specific relief defining title and ownership of at least 22 separate  
21 parcels of real property which belong to at least 22 different and distinct Defendants.  
22 Although the Committee's Motion indicates that they have restricted summary judgment to  
23 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause  
24 of action by way of an "alter ego" argument.

25           The Committee's Motion attempts to "lump" St. Thomas More's real property with  
26 other Defendants' real property interests, dealing with all parcels of property collectively,  
including all improvements and fixtures. However, each parcel of real property is a  
separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,  
2 and use. The committee's standardized factual scenario is inapplicable and not an  
3 appropriate basis for declaratory relief against St. Thomas More.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to  
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)  
8 separate grounds.

9 1. Nothing contained within the express language of Section  
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a  
creditors committee to file suit against non-debtors to define a non-debtor's  
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject  
12 matter jurisdiction over the claims alleged in the Committee's Complaint  
13 because there is no case or controversy between the Committee and the  
Parishes within the meaning of the Declaratory Judgment Act and Article III of  
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28  
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief  
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks  
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of  
23 separate legal entities. The Complaint does not present a federal question nor is there  
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-  
25 debtor defendants. As such, it could have easily been brought in state Superior Court  
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, St. Thomas More does not consent to  
2 entry of Findings of Fact and Conclusions of Law and does not waive defenses related to  
3 Plaintiff's standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

#### 4 IV.

#### 5 STATEMENT OF FACTS

6 St. Thomas More was established as a separate and independent Parish in 1957.  
7 (Aff. A. Parcher ¶ 4; Aff. M. Weber ¶ 5) Currently St. Thomas More is a parish comprised  
8 of at least 1250 member households. (Aff. A. Parcher, ¶ 5) Under Canon Law, St. Thomas  
9 More is a separate and distinct legal entity known as a juridic person. [Canons §113-115,  
10 §515] Under Civil Law, St. Thomas More is an unincorporated association. (Committee's  
11 Statement of Undisputed Fact, No. 23) The property in issue in the Committee's motion is  
12 identified as: West 10 feet of Lot 12 Block 6 of Replat of Blocks 3-8 inclusive in Cozza 7.  
13 (Aff. A. Parcher ¶¶ 6-7) The property at issue belongs to St. Thomas More. (Aff. A.  
14 Parcher ¶ 8) St. Thomas More, through donations and tithes of its parishioners, paid the  
\$500.00 consideration for the transfer of this property in 1991. (Aff. A. Parcher ¶ 7)

15 St. Thomas More has held, used and maintained land, and made numerous  
16 improvements on this land over the years. (Aff. A. Parcher ¶ 12; Aff. M. Weber ¶ 5) The  
17 money needed for these improvements was raised by parishioners from parishioners for  
18 the sole benefit of St. Thomas More Parish. (Aff. M. Weber ¶ 6) Since its establishment,  
19 the parish of St. Thomas More has been comprised of, built, improved and maintained by  
20 gifts, donations and tithes of parishioners. (Aff. A. Parcher ¶ 11, Aff. M. Weber ¶ 6, 7)

21 St. Thomas More has always held the beneficial interest in its real property and St.  
22 Thomas More's ownership interest has never been disputed by the Diocese. (Aff. A.  
23 Parcher ¶ 8) Over the years St. Thomas More has owned additional real property that it  
24 has since sold. (Aff. M. Weber ¶ 7) In approximately 1988, real property owned by St.  
Thomas More was sold by St. Thomas More. (Aff. M. Weber ¶ 7) All proceeds from the  
sale of the real property were retained by St. Thomas More. (Aff. M. Weber ¶ 7)

25 In addition to holding a beneficial and equitable ownership interest in the real  
26 property in question, St. Thomas More clearly exists as its own independent entity.

1 Consistent with its ownership of the real property, St. Thomas More, through its  
2 Parishioners, has paid all insurance premiums, completed and paid all fees with tax exempt  
3 forms related to the real property, and paid all local assessments. (Aff. A. Parcher ¶¶ 9, 10)

4 The financial strength or weakness of a parish is dependent almost entirely upon its  
5 Christian faithful. (Aff. A. Parcher ¶ 11) Offerings, gifts, and tithes are made by  
6 Parishioners of the Parish, for the financial well being of the Parish. (Aff. A. Parcher ¶ 11;  
7 Aff. M. Weber ¶¶ 5, 6) St. Thomas More, since its inception, has raised money through  
8 weekly collections, tithes, gifts, and capital campaigns. (Aff. A. Parcher ¶ 11)

9 Over the years since its inception St. Thomas More has engaged in the use of the  
10 Diocese's Deposit and Loan Fund. Parish Money (which is traceable back to St. Thomas  
11 More bank accounts and further to donations from Parishioners) is placed on deposit in the  
12 Fund with the clear expectation of its return to St. Thomas More for its use. (Aff. A.  
13 Parcher ¶ 13) St. Thomas More has held capital campaigns directed at paying off the loan  
14 it owe to the Diocese. (Aff. A. Parcher ¶ 13)

15 In addition to banking with the Diocese Deposit and Loan, St. Thomas More banks in  
16 the public sector. Its accounts are with recognized banking institutions, held in St. Thomas  
17 More's name exclusively. (Aff. A. Parcher ¶ 14)

18 St. Thomas More is truly an independent entity both legally and financially. For  
19 example, St. Thomas More has its own TIN, maintains its own financial records, employs  
20 individuals, and hold title to personal property in its name. (Aff. A. Parcher ¶ 14-16)

21 There has never been any confusion that money donated by parishioners was for  
22 the benefit of St. Thomas More and not for the Diocese. (Aff. M. Weber ¶¶ 5, 6) All fund  
23 raising and donations received by St. Thomas More are the result of Parishioner efforts.  
24 (Aff. A. Parcher ¶¶ 11-13; Aff. D. Weber ¶ 5)

25 Contrary to the Committee's conclusions, the facts demonstrate St. Thomas More is  
26 its own legal entity and is the true owner of all equitable and beneficial interest of the real  
property identified as "St. Thomas More – Medical Lake" by the Committee.



V.

**STANDARDS OF REVIEW**

**A. Declaratory Judgment Standard.**

The Committee glosses over the fact that the relief it seeks is entirely declaratory in nature. A declaratory judgment action is ripe for adjudication only where an "actual controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5<sup>th</sup> Cir. 2000). "As a general rule, an actual controversy exists where 'a substantial controversy of sufficient immediacy and realty [exists] between parties having adverse legal interests.'" Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5<sup>th</sup> Cir. 1986).

Although some Bankruptcy Courts have entertained declaratory judgment actions filed by trustees when the ownership interest of an asset was in dispute which the trustee asserted was property of the estate on the petition date, the present case is not advanced by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11<sup>th</sup> Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v. Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505 (Bankr. S.D. Fla. 1987).

There is no legal relationship between St. Thomas More, the Committee, or any Committee members. Furthermore, there is no legal dispute between St. Thomas More and the Debtor regarding the ownership interests in real property or trust relationship between the Debtor and St. Thomas More. It is correctly described and defined in the Debtor's Statement of Affairs in accordance with the relationship between the parties as established by Canon Law and Civil Law. As such, no actual controversy between parties with adverse legal interests exists.

**B. Summary Judgment Standard.**

The party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden, he is not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142, 90 S. Ct. 1598 (1970).



1 In determining whether there are any genuine issues of material fact, the Court must  
2 view the evidence in the light most favorable to the nonmoving party. Summers v. A.  
3 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9<sup>th</sup> Cir. 1997). The party opposing summary  
4 judgment to survive the motion need only present evidence from which a jury might return a  
5 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at  
6 1039, citing Anderson v. Liberty Lobby, Inc.

7 The Committee has failed to produce any evidence to support its contention that the  
8 beneficial and equitable ownership of the real property does not belong to St. Thomas  
9 More.

10 However, St. Thomas More has not only produced reasonable evidence as to a  
11 material issue of fact as to its ownership interest in the real property, it has also produced  
12 overwhelming evidence that St. Thomas More is the true owner of the real property in  
13 question.

## 14 VI.

### 15 LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF 16 CONCERNING REAL PROPERTY OWNERSHIP

#### 17 A. Whether Applying Civil Law Or Canon Law, St. Thomas More Parish Is A 18 Separate And Distinct Legal Entity.

19 The Committee has conceded that Parishes are unincorporated associations.  
20 (See, Committee Statement of Undisputed Fact No. 23) The Committee's  
21 acknowledgment of St. Thomas More's status as a separate legal entity from the  
22 Debtor is consistent with both Civil and Canon Law.

#### 23 1. Washington Law Recognizes St. Thomas More As A Legal Entity.

24 The Parish, as an unincorporated association, is a separate legal entity under  
25 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian  
26 faithful ("Parishioners") of each Parish are the residents of their local community. They are  
residents of cities, towns, and counties within Eastern Washington, in some cases they are

1 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group  
2 pursuing a common purpose. In the case of each parish, the common purpose is the  
3 fulfillment of their religious tenets.

4 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,  
5 without a charter, formed by mutual consent for the purpose of promoting common  
6 enterprise or prosecuting common objective. An organization composed of a body of  
7 persons united with a charter for the prosecution of a common enterprise." *Black's Law*  
8 *Dictionary*, 1531 (6<sup>th</sup> 1991). This is a broad definition, and Washington has recognized that  
9 "associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997).  
10 Washington's case law recognizes a variety of forms of unincorporated associations,  
11 including groups of individuals of a particular religion or creed. See *Bacon v. Gardner*, 38  
12 Wn.2d 299 (1951), *Church of Christ v. Carder*, 105 Wn.2d 204 (1986).

13 Unincorporated associations clearly have the ability to hold the equitable interests of  
14 a trust and defend that interest in court. *Leslie v. Midgate Center, Inc.*, 72 Wn.2d 977  
15 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated  
16 associations to be parties to lawsuits. *Bacon v. Gardner*, 38 Wn.2d 299, 304 (1951); *State*  
17 *v. Bothell*, 89 Wn.2d 862, 866 (1978); see also *Church of Christ v. Carder*, 105 Wn.2d 204,  
18 206 (1986); *Riss*, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the  
19 capacity to appear and represent their interests in declaratory judgment actions. *RCW §§*  
20 *7.24.110 - .130* (West 2005). It is well settled law that unincorporated associations have  
21 the ability to represent the interests of their members in legal actions. See, *State v. Bothell*,  
22 89 Wn.2d at 866.

23 It is important to note that not a single case quoted by the Committee in support of  
24 its assertion that each Parish is not a legal entity is from the state of Washington.  
25 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

26 The capacity of an individual, other than one acting in a representative  
capacity, to sue or be sued shall be determined by the law of the individual's  
domicile. The capacity of a corporation to sue or be sued shall be determined  
by the law under which it was organized. In all other cases capacity to sue or  
be sued shall be determined by the law of the state in which the district court  
is held . . . .

1 As a matter of law, unincorporated associations can be sued under Washington law.  
2 The various cases cited by the Committee have no precedential value here in Washington.  
3 The Committee's argument that St. Thomas More does not have a legal existence separate  
4 from the Diocese fails as a matter of law. It is also inconsistent with Committee's  
5 Statement of Undisputed Fact No. 23.

## 6 **2. St. Thomas More Is A Separate Legal Entity Under Canon Law.**

7 The Law of the Roman Catholic Church ("Church") has been in existence since the  
8 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the  
9 extent the resolution of this matter requires a determination of the relationship between the  
10 Debtor and St. Thomas More in their methods of governance, interaction or management,  
11 compulsory deference is required to the provisions of the Code of the Canon Law which  
12 govern these religious organizations under applicable law. The Supreme Court, when  
13 faced with issues involving the Roman Catholic Church, has stated:

14 In the absence of fraud, collusion or arbitrariness, the decisions of proper  
15 church tribunals on matters purely ecclesiastical, although affecting civil  
16 rights, are accepted in litigation before the secular courts as conclusive,  
17 because the parties in interest made them so by contract or otherwise. Under  
18 like circumstances, effect is given in the courts to the determination of the  
19 judiciary bodies established by clubs and civil associations.

20 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, \_\_\_ S.Ct. \_\_\_, 74 L.Ed.131,  
21 137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (\_\_\_)).

22 This legal principle has been clearly adopted by the Washington State Supreme  
23 Court, when addressing real property interests involving a hierarchal church. See,  
24 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of  
25 Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.  
26 App. 814 (1982) (All applying the compulsory deference rule established in Watson to  
disputes involving church property.)

In this case, the identity of the Parish, the Parishioners, the Debtor, and their  
relationship to their property rights are defined within Canon Law. These relationships, are  
"purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation

1 before secular courts as conclusive[.]” Gonzalez, 280 U.S. at 16, \_\_\_\_ S.Ct. at \_\_\_\_, 74 L.Ed.  
2 at 137.

3 Within the Church, besides physical persons, there are also juridic persons, that is,  
4 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon  
5 113(2)) A juridic person is an artificial person distinct from all natural persons or material  
6 goods. Like a civil law corporation, it is a legal entity which can and must be conceived  
7 apart from the natural persons who constitute it, administer it, or for whose benefit it exists.  
8 See L. Chiappetta, *Il Codice di Diritto Canonico: Comento Giuridico-Pastorale*, 2<sup>nd</sup> ed.  
9 (Rome: Dehoniane, 1996) 1:169; Robert Kennedy, *New Commentary on the Code of*  
10 *Canon Law* (Paulist Press 2000).

11 Canon Law provides that:

12 A parish is a certain community of the Christian faithful stably constituted in a  
13 particular church, whose pastoral care is entrusted to a pastor as its proper  
14 pastor under the authority of a diocesan bishop. (Canon 515(1))

15 Canon 515(3) states:

16 A legitimately erected parish possesses juridic personality by the law itself.  
17 (Canon 515(3))

18 In this case, there is no dispute that St. Thomas More is a legitimately erected  
19 Parish and a juridic person under Canon Law.

20 Canon Law is clear that property acquired by a Parish belongs to the Parish.  
21 Specifically, Canon 1256 states:

22 Under the supreme authority of the Roman Pontiff, ownership of goods  
23 belongs to that juridic person which has acquired them legitimately. (Canon §  
24 1256)

25 Since its inception, the Christian faithful themselves, which constitute the Parish,  
26 have acquired both real and personal property which is used by the Christian faithful in their  
fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used  
by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)  
The juridic person (Parish) may not be deprived of its property without consent and  
approval. (See Canons 1281–1288 and 1291-1295)

1                   **3. Committee Waived Argument on Individual Parish Standing.**

2           The Committee's decision to name and sue St. Thomas More and 81 other Parishes  
3 individually is evidence of the separate legal identity of each parish. Furthermore, the  
4 Committee admits that St. Thomas More is a separate unincorporated association in its  
5 Statement of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a  
6 party from taking divergent positions in different legal proceedings. Wagner v. Proff  
Engineers in California Court, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004).

7           In addition, the request for relief in the Complaint seeks substantive consolidation of  
8 St. Thomas More with the Debtor. Substantive consolidation in bankruptcy terms is the  
9 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229  
10 F.3d 750 (9<sup>th</sup> Cir. 2000)) As such, the Committee has already recognized the legal identity  
11 of St. Thomas More is separate and apart from the Debtor. The Committee should be  
12 estopped from taking a contrary position for purposes of its Motion.

13                   **4. Judicial Estoppel Does Not Apply to St. Thomas More.**

14           St. Thomas More does not dispute the definition of judicial estoppel submitted by the  
15 Committee which is designed to prevent a party from taking divergent positions in different  
16 legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v. Prof.  
Engineers in California Gov't, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004). However, the  
17 Committee fails to present a full recitation of the elements required for a finding of judicial  
18 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.

19           The United States Supreme Court recently listed three factors that  
20 courts may consider in determining whether to apply the doctrine of judicial  
21 estoppel:

22                   ...

23           First, a party's later position must be "clearly inconsistent" with its  
24 earlier position. Second, courts regularly inquire whether the party has  
25 succeeded in persuading a court to accept that party's earlier position, so that  
26 judicial acceptance of an inconsistent position in a later proceeding would  
create "the perception that either the first or the second court was misled[.]"  
Absent success in a prior proceeding, a party's later inconsistent position  
introduces no "risk of inconsistent court determinations," and thus no threat to  
judicial integrity. A third consideration is whether the party seeking to assert

1 an inconsistent position would derive an unfair advantage or impose an unfair  
2 detriment on the opposing party if not estopped. In enumerating these  
3 factors, we do not establish inflexible prerequisites or an exhaustive formula  
for determining the applicability of judicial estoppel. Additional considerations  
may inform the doctrine's application in specific factual contexts.

4 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9<sup>th</sup> Cir. 2001), citing New  
5 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The  
6 application of judicial estoppel is appropriate to bar litigants from making incompatible  
7 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,  
8 605 (9<sup>th</sup> Cir. 1996).

9 The position taken by St. Thomas More is not inconsistent with the holding of the  
10 cases cited by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en banc*),  
11 the case was actually filed by the individual members of St. Patrick's Parishioners and  
12 Friends of Historic Preservation. Of the seven members, six were members of the Parish.  
13 Id. at 196. The issue arose when the "St. Patrick Building Committee," a parish committee,  
14 applied for a demolition permit related to St. Patrick School. This was a case of historic  
15 preservation interests vs. parish building committee interests, Parishioner v. Parishioner.  
16 Id. at 194-199. The case holding invalidated a statute that was being used by a non-  
17 parishioner in an attempt to stop a building project advanced by a parish building  
committee for the furtherance of the Church's fundamental right to exercise religion. The  
ordinance was found to have a coercive effect on the practice of religion.

18 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.  
19 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have  
20 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the  
21 Court of Appeals and should not be considered in the trial courts. They do not become a  
22 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668  
(1971)(emphasis added).

23 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based  
24 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its  
25 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in  
26 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with



1 the current position taken by the Diocese and the Parishes. There is no assertion or  
2 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the  
3 Diocese and the Parishes assert that the Diocese holds an ownership interest in the  
4 property, but holds that interest in trust for the Parishes. This is not an inconsistent  
5 position. Rather, the ownership status of the Bishop in Miller was never addressed or  
6 litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's  
7 earlier position" because the **nature** of the Bishop's ownership interest was never at issue.  
8 Therefore the current position, which is consistent with the prior position, introduces no risk  
9 of inconsistent court determinations.

10 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic**  
11 **Bishop of Chicago and Oregon Case Law is Misplaced.**

12 First, both Oregon and Illinois apply a neutral principle of law approach to church  
13 property issues. When examining church property disputes, Washington applies the more  
14 stringent approach of compulsory deference. Furthermore, the legislative histories and  
15 governing statutes concerning corporate soles is much different than that of Washington.

16 F.E.L Publications was a seventh circuit case which decided the issue on the legal  
17 relationship between the Diocese and the Parishes within it in order to resolve a claim  
18 against the diocese for tortious interference with a business relationship. There the Court  
19 held that it was impossible for the cause of action to be based on the Diocese's directives  
20 to the Parishes as those Parishes had no independent status, and were in fact "subsumed  
21 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied  
22 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41  
23 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)  
24 and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily  
25 relied upon was Galich, however, that issue was not before the court in Galich.

26 In Galich, the Court held that the statute under which the Bishop of Chicago  
incorporated did not create a statutory trust for the benefit of the Parishioners bringing the  
case. Further, the Court held that any determination of the ability or inability of the Bishop  
to demolish a church would violate the First Amendment.



1 The statute under which the case was decided was subsequently amended. As  
2 amended, it includes a great deal of language indicating a legislative intent to create a trust  
3 for the benefit of the religious congregation for whom the corporation is formed.

4 The other cases relied upon by the F.E.L. Court only support its conclusion by  
5 inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip  
6 and fall case at a Catholic school. While the issue was not addressed by the Court in  
7 Haymes, the implication is that the Catholic school could not have been the proper  
8 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged  
9 the validity of a local zoning ordinance precluding the creation of a cemetery in the space  
10 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic  
11 Bishop was the only party which could have brought the action does this case support the  
12 conclusion reached by the F.E.L. Court.

13 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real  
14 Property At Issue.**

15 The Committee argues in its Complaint and subsequent Motion that by virtue of its  
16 interpretation of law and facts that St. Thomas More's real and personal property is  
17 property of the Debtor's bankruptcy estate. However, this argument is not substantiated.  
18 Section 541 of the Bankruptcy Code specifically excludes from the estate property to which  
19 the Debtor holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. §  
20 541(b), (c), and (d))

21 The concept of trust relationships, bare legal title, and beneficial/equitable ownership  
22 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor  
23 holds mere legal title to property and a non-debtor holds the beneficial or equitable  
24 ownership of that property, said property is not property of the estate. See Matter of  
25 Torrez, 63 BR 751, 754-55 (9<sup>th</sup> Cir. BAP 1986)(imposition of resulting trust appropriate  
26 since title was only put in children's name to avoid certain restrictions in a government  
program); Sale of Guar. Corp., 220 BR 660, 664 (9<sup>th</sup> Cir. BAP 1998)(where the transferee of  
property does not pay the purchase price for the property, the transferee is presumed to

1 hold the property in a resulting trust for the party who paid the consideration for its  
2 purchase).

3 The standard of inquiry under section of the Bankruptcy Code excluding from  
4 property of the estate trust interests that are subject to transfer restrictions enforceable  
under applicable non-bankruptcy law, normally has three parts:

- 5 (1) whether the debtor has a beneficial interest in a trust;
- 6 (2) whether there is a restriction on the transfer of that interest; and
- 7 (3) whether the restriction is enforceable under non-bankruptcy law.

8 In re Wilcox, 233 F.3d 899 (6<sup>th</sup> Cir. 2000)

9 The evaluation of each element is resolved in accordance with and through the  
10 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d  
136, 141-42 (1979).

11 Washington law clearly establishes that the Debtor holds only "bare legal title" to the  
12 property in question. St. Thomas More is the true beneficial and equitable ownership of the  
13 real property in dispute.

14  
15 **1. St. Thomas More Parish Is The Beneficiary Of A Statutory Trust, Holding**  
16 **All Equitable And Beneficial Interest In The Real Property.**

17 The corporation sole statute in Washington clearly and explicitly creates a statutory  
18 trust comprised of the disputed property held for the benefit of the Church and its  
parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

19 The legislative history is absolutely clear that the statute was enacted to create a  
20 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was  
21 entitled:

22 An Act providing for the organization of corporations sole, defining their  
23 powers, authorizing them to transact business and hold property in trust for  
religious denominations societies or churches.

24 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,  
25 it was referred to the Senate Committee on Corporations other than Municipal. Id. After  
26

1 review by the Committee, recommended that the bill be passed the Senate on March 6,  
2 1915.

3 The bill was subsequently passed by the house on March 10, 1915, and was  
4 approved by the Governor March 15, 1915.

5 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and  
6 Powers of Corporations Sole."

7 Section 3 specifically states:

8 . . . . Provided, all property held in such official capacity by such bishop,  
9 overseer or presiding elder, as the case may be, shall be in trust for the use,  
10 purpose, benefit, and behoof of his religious denomination, society or church.

11 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

12 As a corporation sole, the Debtor has the power to contract, sue, and be sued in  
13 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in  
14 real and personal property in the same manner as any natural person. Id. This grant of  
15 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The  
16 trust is comprised of all the property held by the Debtor in its official capacity. RCW §  
17 24.12.030 (West 2005). Specifically the statutes state:

18 . . . All property held in such official capacity by such bishop, overseer or  
19 presiding elder as the case may be, shall be in trust for the use, purpose,  
20 benefit and behoof of his religious denomination, society or church.

21 RCW § 24.12.030 (West 2005).

22 Every corporation sole shall, for the purpose of the trust, have the power to  
23 contract in the same manner and to the same extent as a natural person, and  
24 may sue and be sued, and may defend in all courts and places, in all matters  
25 and proceedings whatever, and shall have authority to borrow money and  
26 give promissory notes therefor, and to secure the payment of the same by  
mortgage or other lien upon property, real and personal; . . .

RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal  
relationship between the Debtor, St. Thomas More, and Parishioners as a relationship of  
trustee and beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent with  
the norms of Canon Law which provide that each parish is a Church capable of acquiring  
and owning real and personal property interests.

1 Despite this clear statute and governing principles of Canon Law, the Committee  
2 misconstrues Washington case law explicitly recognizing the restrictions existing on  
3 property impressed with a trust by dedication to religious organizations for the benefit of  
4 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386  
5 (1943), cited by the Committee, the Court explicitly notes that while the alienation of the  
6 property in that case was within the power of the trustee, the use of the proceeds from the  
7 sale could not be diverted from the benefit of the religious purposes for which the property  
8 was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the  
9 purpose of respondents was to divert the funds to be received from the sale of the property  
10 to other than religious purposes of the Episcopal Church, the court could and would enjoin  
11 them. The trustee is merely the holder of the legal title.") Even the court's explicit holding,  
12 quoted only in part by the Committee, recognizes that courts will ensure that property of a  
13 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose  
14 for which the trust is held. Id. at 386. Specifically, the court stated: "For in a trust of the  
15 character involved here, where no restraint is imposed on the right to alienate, the courts  
16 will not interfere further than to see to it that the proceeds from the sale of the trust property  
are not diverted from the use for religious purposes of the faith or denomination to which  
the property was dedicated." Id. (emphasis added).

17 Despite the Committee's assertion that "[t]he corporation sole statute's 'trust' for the  
18 Church is no different than the trust in Wilkeson ..." (Committee's Memo, p. 11) the  
19 Committee disregards the court's explicit statements upholding restrictions on the use of  
20 the trust res and its proceeds, and identifying that "[t]he trustee is merely the holder of the  
21 legal title." Id. at 385. The Committee's memorandum repeatedly fails to distinguish  
22 between the rights and obligations of a trustee as the legal title holder of property, and the  
23 existence of an equitable interest in the property, attempting instead, to equate the holding  
24 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.  
25 This merely evidences a lack of recognition of the distinction between legal title and an  
26 equitable interest, and does not support the Committee's argument that no trust exists.

The Catholic Bishop of Spokane is the trustee of the statutory trust created under  
RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the

1 power to alienate certain property of the trust, any such alienation must be for the "benefit  
2 and behoof of his religious denomination, society or church." RCW § 24.12.030 (West  
3 2005). With regard to "proceeds from the sale of the trust property," they "are not to be  
4 diverted from the use for religious purposes of the faith or denomination." Wilkerson, 176  
5 Wash. at 386. The statutory trust under which the property is held reserves the beneficial  
6 use of the property for St. Thomas More.

## 7           2.       **St. Thomas More Is The Beneficiary Of An Express Trust.**

8 The recognition and observance of the civil duties of a trustee have been impressed upon  
9 the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated as a  
10 corporation sole under the foregoing statute on July 3, 1915. With respect to St. Thomas  
11 More Parish, this trust relationship commenced with the formation of the Parish. The  
12 Washington Supreme Courts has noted that statements in articles of incorporation can be  
13 sufficient to create an express trust. Hoffman v. Tieton View Methodist Church, 33 Wn.2d  
14 at 727 (1949) ("There is no question in our minds but that all property acquired by Tieton  
15 View was, under article VIII of its articles of incorporation ... held in trust for the uses of the  
16 Methodist Church...").

17 The articles of incorporation clearly express the intent of creating and maintaining a  
18 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles  
19 expressly provide:

### 20                               ARTICLE III

21       This corporation is formed for the purpose of transacting business and  
22 **holding property in trust** for that certain religious denomination or society  
23 known as the Roman Catholic Church; to do business and contract in the  
24 same manner and to the same extent as a natural person; to borrow money  
25 and give promissory notes therefor, and to secure the payment of the same  
26 by mortgage or other lien upon property real and personal; to buy, sell, lease,  
mortgage, and in every way use and deal in real and personal property and to  
receive bequests for its own use or upon trusts.

### 24                               ARTICLE IV

25       The incorporator of this corporation is Augustine F. Schinner, who is the duly  
26 appointed, qualified and acting Roman Catholic Bishop of the Diocese of  
Spokane, in the state of Washington, and who as such Bishop of the Roman

1 Catholic Church has subscribed these Articles of Incorporation, in order to  
2 become a corporation sole, together with his successors in office by his  
3 official designation, in the manner prescribe in "An Act Providing for the  
4 Organization of Corporations Sole, Defining Their Powers, **Authorizing them  
to transact business and hold property in trust for religious  
denominations, societies or churches.**" passed by the Legislature of the  
State of Washington and approved by the Governor, March 15th, 1915.

5 ARTICLE V.

6 This incorporation is a religious corporation, not organized for gain and is  
7 without capital stock, **all property held by it being in trust** for the use,  
purpose, benefit and behoof of the Roman Catholic Church of the Diocese of  
Spokane, in the State of Washington.

8 (Articles of Incorporation, 713115, Emphasis Added)

9 An express trust "arises because of the expressed intent and involves a fiduciary  
10 relationship in which the trustee holds property for the benefit of a third party." Goodman v.  
11 Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly  
12 expressed the intent to hold property in trust for the benefit of the Parishes of the Church of  
13 the Diocese of Spokane.

14 A trust will be found to exist if there is a clear manifestation of an intent to create a  
15 trust, and the entire instrument, as well as its general purpose and scope, should be  
16 considered, and the instrument should be construed in light of the circumstances  
17 surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726  
(1949).

18 In this case, the trust instrument consists of the deed, which contains explicit  
19 language referencing the fact title is held by a "Corporation Sole." The statute governing  
20 corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship  
exists.

21 Just as use and occupancy of property is sufficient to place others on notice of the  
22 possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the  
23 failure of a spouse to record an interest in community property does not preclude that  
24 spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531  
25 (1937)), the use, improvement and maintenance by St. Thomas More of property recorded  
26 in the name of a corporation sole, places the world on notice of the statutory trust under



1 which it is held, and identifies the true nature of the Debtor's interest in the property. Cf. In  
2 re Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory  
3 trust, and noting that such a finding creates no burden on creditors "[a]s opposed to  
4 contractual or implied trusts, the stature is public. There is no secret agreement between"  
5 the parties.).

### 6 **3. Statute Of Frauds Does Not Make The Express Trust In This Case** 7 **Defective.**

8 Generally, the statute of frauds will prevent parol evidence from enforcing the terms  
9 of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.  
10 356, 365 (1994). An exception to the requirement for an express trust over real property is  
11 a situation where a beneficiary of the trust has partially performed in accordance with the  
12 trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.  
Sanders, 100 Wn.2d 853 (1984).

13 The standard for evaluating partial performance is whether the beneficiary, with the  
14 consent of the trustee:

- 15 a. Enters into possession of the land;
- 16 b. Makes improvements to the land; and
- 17 c. Changes position in reliance of the trust.

18 See, Diel at 144-145.

19 As demonstrated in the Statement of Facts in this Memorandum (Section IV), St.  
20 Thomas More and its parishioners have held possession of the property to the exclusion of  
21 all others. St. Thomas More has made all improvements to the land and maintained the  
22 structures thereon. All donations have been received with the understanding that St.  
23 Thomas More improved the real property to fulfill religious tenets of the Parish. Such  
24 actions were taken with the understanding the Church property was property belonging to  
25 St. Thomas More.  
26



1 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

2 The Committee's discussion of the administrative dissolution of nonprofit  
3 corporations is wholly irrelevant to the enforceability of the restrictions placed on property  
4 donated to St. Thomas More under Washington law. This is not an instance of an  
5 administrative dissolution by the state, but a reorganization under Title 11 of the United  
6 States Code. Further, St. Thomas More is subject to the Uniform Management of  
7 Institutional Funds Act, RCW Chapter 24.44, which provides only two methods for the  
8 release of a restriction placed on donations. RCW § 24.44.060.

9 Under Washington law, donations given with restrictions as to their use, to  
10 incorporated or **unincorporated organizations operated for religious**, educational, or  
11 other eleemosynary purposes, can only be used in accordance with the restrictions unless  
12 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in  
13 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)  
14 impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General  
15 be given notice and opportunity to be heard on any such matter before the Superior Court  
16 makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.  
17 Id. Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have  
18 a long and well established tradition of honoring the intention of the donors and benefactors  
19 of religious organizations.

20 The facts of this case demonstrate that the real property at issue was paid for with  
21 donated funds, improved, and maintained with donated funds for the benefit of St. Thomas  
22 More.

23 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not**  
24 **Exist, A Resulting Trust Should Be Found In Favor Of St. Thomas More.**

25 Even if the statutory and express trusts are found to be ineffective, the acquisition  
26 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where  
property is taken in the name of a grantee other than the person advancing the  
consideration, the one in whose name title is taken is a resulting trustee for the person who  
paid the purchase price, in the absence of proof of a contrary intention." Mading v.

1 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to  
2 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74  
3 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).  
4 "Similarly, where property is transferred to one person and the purchase price is advanced  
5 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d  
6 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence  
7 of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at  
8 Section IV – Statement of Facts – all acquisitions of real and personal property, all  
9 improvements, and all maintenance of the property was paid for with money directly  
10 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and  
11 intent that it was for the benefit of Parish property. Just as in the case of Matter of Torrez,  
12 63 BR 751, 754-755 (9<sup>th</sup> Cir. BAP 1986), the imposition of a resulting trust is appropriate  
13 since title was placed in the name of the corporation sole with the understanding it was held  
14 in trust for St. Thomas More. The Bishop never intended to actually own the property or  
15 assert control over the property or improvements as exclusive owner.

16 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**  
17 **owed to St. Thomas More, A Constructive Trust Must Be Imposed.**

18 The facts surrounding the nature of the relationship between the Debtor, St. Thomas  
19 More, and the acquisition of the property establish a constructive trust for the benefit of St.  
20 Thomas More. "A constructive trust is an equitable remedy which arises when the person  
21 holding title to property has an equitable duty to convey it to another on the grounds that  
22 they would be unjustly enriched if permitted to retain it." Lakewood v. Pierce County, 144  
23 Wn.2d 118, 126 (2001). A constructive trust will be "imposed when there is clear, cogent  
24 and convincing evidence of the basis for impressing the trust." Id. To establish a  
25 constructive trust, a "party must show the trust arose from the relationship of the parties  
26 involved, and that the property justly belongs to that party." Id. at 129. Here, the intent of  
the parties was to create valid statutory and express trusts, the beneficial use of the  
property was at all times held reserved by and for St. Thomas More. Not only is there  
clear, cogent and convincing evidence for the imposition of a trust, but for the Court to hold

1 that the property in dispute belongs to the Debtor would unjustly enrich the Debtor to the  
2 detriment of St. Thomas More who has relied on its ownership of the property since the  
3 parish was founded.

4 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law**  
5 **And Fact.**

6 The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to  
7 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this  
8 case, the Committee is asking the Court to rule that St. Thomas More is liable for the debts  
9 of the Debtor, a corporation sole, even though St. Thomas More is a separate legal entity  
10 and is clearly not a "shareholder" of the Debtor.

11 When Washington Courts invoke "piercing the corporate veil", they have applied the  
12 "doctrine of corporate disregard" based upon two elements:

- 13 a. "The corporate form must be intentionally used to violate or evade a duty,"  
14 and  
15 b. "Disregard must be necessary and required to prevent unjustified loss to the  
16 injured party."

17 See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d  
18 689 (1982)

19 The first factor requires a showing of abuse of the corporate form, typically involving  
20 fraud, misrepresentation, or other action **by the corporation that harms the creditor and**  
21 **benefits the shareholder.** The second factor requires that the harm must actually occur.  
22 In this case, the Committee has neither plead nor demonstrated any facts to support both  
23 requirements of an "Alter Ego Claim."

24 The undisputed facts offered by St. Thomas More demonstrate a claim of "Alter Ego"  
25 is without merit. (See Statement of Facts, Section IV)  
26

1  
2           **1.     The Committee Attempts To Circumvent Statutory Prohibitions Against**  
3           **Substantive Consolidation Of A Not “Moneyed” Entity.**

4           The Committee's Complaint, in its third cause of action, seeks a declaratory order for  
5 substantive consolidation “all Diocese Related Entities.” The Committee's Motion for  
6 Summary Judgment now seeks a declaratory order under a theory of “Alter Ego.” Such a  
7 legal theory is nothing more than a thinly veiled attempt to place St. Thomas More and  
8 other non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief  
9 which is forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative  
10 history. House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess 321 (1977).

11           The Bankruptcy Code clearly recognizes that not all debtors are the same. And  
12 while Chapter 11 and its provisions do not generally distinguish between for-profit, non-  
13 profit, and religious organizations for the purposes of reorganization, that is not to say that  
14 a distinction does not exist and should not or cannot be made. For example, under the  
15 Bankruptcy Code non-profit corporations are treated more favorably than for-profit  
16 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from  
17 involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case  
18 filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has  
19 recognized that religious organizations present unique bankruptcy issues because  
20 government regulation of religion implicates First Amendment rights. For example, the  
21 Bankruptcy Code has been modified by Congress to protect free exercise of religion to  
22 prevent a trustee from avoiding a debtor's donation given to a religious or charitable  
23 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.  
24 L. No. 105-183, 112 Stat. 517 (1998).

25           Substantive consolidation has no express statutory basis, but rather, is a “product of  
26 judicial gloss.” In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2<sup>nd</sup> Cir. 1988).  
Substantive consolidation results in pooling the assets of, and claims against, the two  
entities, satisfying liabilities from the resultant common fund; eliminating inter company  
claims; and combining creditors of the two companies for purposes of voting on  
reorganization plans. In re Bonham, 229 F.3d 750, 764 (9<sup>th</sup> Cir. 2000).

1 In the present case, even if the Committee could get around the statutory  
2 prohibitions, the Committee would have to demonstrate 1) that the Committee or its  
3 members dealt with St. Thomas More Parish and the Debtor as a single economic unit and  
4 did not rely on the separate credit of each of the entities; or that the operations of the  
5 Debtor and St. Thomas More Parish were **excessively** entangled with the Debtor's affairs  
6 to the extent that consolidation will benefit all creditors. See In re Bonham, 229 F.3d 750,  
7 766 (9<sup>th</sup> Cir.).

8 The newly surfaced "Alter Ego" theory is nothing more than a recognition that  
9 Committee's third cause of action has no application in this case.

10 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**  
11 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**  
12 **Act.**

13 The exercise of religion includes the "right to believe and profess whatever religious  
14 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or  
15 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877  
16 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if  
17 the government "substantially burdens" a person's exercise of religion, and the government  
18 does not demonstrate that it has a "compelling government interest" to justify the religious  
19 burden, then the government intrusion into a person's free exercise of religion has been  
20 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later  
21 limited Sherbert by holding that "the right of free exercise does not relieve an individual of  
22 the obligation to comply with a 'valid and neutral law of general applicability . . .'" See  
23 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was  
24 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42  
25 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), "to restore the compelling interest test as set  
26 forth in Sherbert," and "to guarantee its application in all cases where free exercise of  
religion is substantially burdened," including cases in which the law at issue was of "general  
applicability." See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507  
(1997), the Supreme Court declared RFRA unconstitutional as applied to state actions

1 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth  
2 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA "intruded into an  
3 area reserved by the Constitution to the States"). However, RFRA continues to be  
4 constitutional as applied to federal law.

5 Under RFRA, a neutral law of general applicability is an unconstitutional  
6 infringement of a person's free exercise rights if the following is true: (1) the law  
7 substantially burdens a person's exercise of religion; (2) the government cannot justify the  
8 law with a compelling government interest, and (3) there are no less restrictive means of  
9 furthering the government's compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

10 Two unique circumstances arise would occur if the Court were to dictate the  
11 ownership and use of Parish property: (1) a religious leader will have been replaced by a  
12 government official as the head of a religious organization, resulting in comprehensive  
13 government surveillance of religion; and (2) a government official will be in an  
14 unprecedented position of decision making power over a church/Parish, a position  
15 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in  
16 the appearance of government endorsement of religion for the benefit of a creditor's  
17 committee.

18 St. Thomas More's economic interests cannot be separated from its spiritual interest  
19 – any economic decision the Court makes regarding use or ownership of property inevitably  
20 has direct and significant religious consequences. Thus, the Court will become hopelessly  
21 entangled with religious policy of the Catholic Church. The effect of St. Thomas More's  
22 spiritual mission is that every financial decision it makes is driven by religious objectives  
23 toward religious ends in accordance with Canon Law. This creates an irreconcilable church  
24 versus state conflict between a non-debtor, a creditors committee, and the Court. By  
25 effectively forcing a Parish into bankruptcy by way of declaratory relief, the government is  
26 changing the essential structure of St. Thomas More under Canon Law. Since the Canon  
directs the religious vision and thus the financial objectives of St. Thomas More, such a  
change would essentially allow government to determine who benefits from St. Thomas  
More's mission.



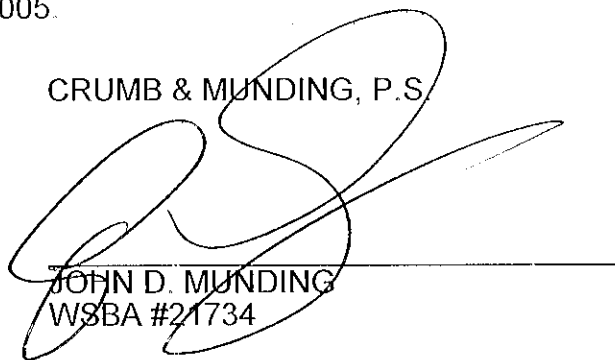
VII.

CONCLUSION

As a matter of law, the Committee has not established a case in controversy with St. Thomas More that would permit the declaratory relief requested. Even if the Court were to consider the pending motion for summary judgment based upon the Committee's factual theory, the Committee's motion fails as the Committee has failed to eliminate material questions of fact as to St. Thomas More's ownership interest in the real property, including furnishing all consideration for purchase, improvements, and maintenance.

DATED this 26<sup>th</sup> day of May, 2005.

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ST. THOMAS MORE PARISH'S OPPOSITION  
TO SUMMARY JUDGMENT - 29

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